

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RELIANT PHARMACEUTICALS, INC.,)
)
Plaintiff,)
) C.A. No. 06-774
v.)
)
PAR PHARMACEUTICAL, INC.,)
)
Defendant.)

Friday, March 7, 2008
11:30 a.m.
Courtroom 4B

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge

APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL
BY: JACK BLUMENFELD, ESQ.

-and-

KIRKLAND & ELLIS
BY: CHRISTINE WILGOOS, ESQ.

Counsel for the Plaintiff

APPEARANCES (Cont'd:)

YOUNG CONAWAY STARGATT & TAYLOR
BY: KAREN L. PASCALE, ESQ.

-and-

FROMMER, LAWRENCE & HAUG
BY: JOHN G. TAYLOR, ESQ.

Counsel for the Defendant

1 THE COURT: Next we'll take
2 Reliant and Barr. All right. The dispute I
3 have been waiting for. Do you want to announce
4 your appearances.

5 MR. BLUMENFELD: Thank you, Your
6 Honor. Jack Blumenfeld again for Reliant
7 Pharmaceutical with Christine Willgoos from
8 Kirkland & Ellis.

9 THE COURT: Good morning.

10 MS. PASCALE: Good morning, Your
11 Honor. Karen Pascale from Young Conaway and I
12 would like to introduce John Taylor from
13 Frommer, Lawrence & Haug, the New York office.

14 MR. TAYLOR: Good morning Your
15 Honor.

16 THE COURT: Okay. Actually you
17 have a pretty straightforward dispute. I have
18 one question about the motion to compel
19 documents relating to consumption, disposal or
20 destruction of Par samples.

21 I think what I read was that there
22 have been replacement samples provided and can
23 somebody address that.

24 MS. WILLGOOS: Good morning, Your

1 Honor. Reliant has requested two types of
2 samples from Par. Their submission samples
3 which is the product that they're seeking
4 approval for in this ANDA as well as what we
5 have been calling experimental batches which are
6 comparative examples used in their ANDA that
7 they have not submitted specifically for
8 approval but are referenced in the ANDA.

9 It's come to our attention Par
10 recently informed us that they inadvertently
11 produced a sample of an experimental batch to us
12 and represented that it was a submission batch.
13 They have now replaced that and have produced
14 the submission batch, Your Honor.

15 THE COURT: So this has kind of
16 gone away?

17 MS. WILLGOOS: It's not gone away,
18 Your Honor. Par's internal documents indicate
19 that there has an ongoing project at Par to
20 discard or destroy samples that were no longer
21 necessary. Some of those appear to have been
22 for pathonomic samples that they have not
23 produced to us, so we're seeking documents to
24 determine what samples they actually have in

1 their possession and to the extent that any are
2 destroyed, the circumstances and dates of such
3 destruction or, you know, consumption or
4 disposal.

5 THE COURT: All right. Do you
6 want to answer what their concern is?

7 MR. TAYLOR: Certainly, Your
8 Honor. This whole motion is based on Reliant's
9 mistaken and persistent belief that Par has
10 manufactured lots of its proposed ANDA product
11 that are different from the three lots that Par
12 has already produced samples from. And that
13 they also assume that these other lots that they
14 think exist may have been destroyed or used up.

15 But that belief is based on
16 Reliant's own assumptions and on its misreading
17 of documents that were produced by Par. And
18 despite Par's best efforts to explain what is a
19 really fairly simple story which is fully
20 supported by Par's documents that there are only
21 three lots of its submission product made, they
22 have produced samples from all three, and that
23 none were destroyed.

24 The facts are here Par had

1 produced samples from the each of the only three
2 lots it produced of its proposed ANDA product
3 and that was produced last April.

4 They also produced documents last
5 April that detailed how these three lots were
6 made.

7 Par has not destroyed any samples
8 and we have represented that to Reliant, but
9 even if it had, it really wouldn't make a
10 difference here, they made three lots, they
11 could have destroyed 90 percent of it as long as
12 they kept enough to produce to Reliant in this
13 litigation which they have enough for their FDA
14 requirements. It wouldn't have matter if they
15 destroyed the rest, but they didn't. We still
16 have plenty of samples from these three lots and
17 if you can tell us why you need more than the
18 original sixty that you asked for, we would be
19 happy to provide those. They haven't said why
20 they need anymore.

21 What's happened here is they
22 refuse to believe that Par has samples, capsules
23 of produced ANDA product that come from other
24 than these three lots. And in spite of our

1 representations and documents to the contrary,
2 they're now demanding that we produce documents
3 explaining what happened to each and every
4 capsule that was made in these three large, 325,
5 425 milligram for pathanome and wants to know
6 what did you give to the FDA, what did you do
7 in-house testing on, what went to clinical
8 trials, they want all this information which is
9 not arguably relevant to this case.

10 Par could have destroyed and used
11 up most of these three lots as long as it had
12 some left to produce. It has, it produced
13 documents as to how they were made. These
14 documents that they're asking for on the
15 consumption, all the post manufacture, what
16 happens to these capsules later is not going to
17 answer the question which we seem to be doubting
18 did you make more than these three lots.

19 THE COURT: Your representation is
20 you didn't?

21 MR. TAYLOR: Right, absolutely.

22 THE COURT: All right. What I'm
23 going to do is deny the motion, accepting your
24 representation as you set forth in your papers

1 and represented here this morning.

2 MR. TAYLOR: Yes, Your Honor.

3 Thank you.

4 THE COURT: And that will resolve
5 that motion.

6 Now, while I have you at the
7 podium, interestingly you want to take a
8 30(b)(6) deposition on the contentions of
9 Reliant and they have told you that there is
10 some transcript law, case law that in this
11 district there is a practice that I think I'll
12 put it a little differently than they have
13 argued it, in this district there is a practice
14 that disfavors depositions on contentions in
15 deference to interrogatories.

16 And you answered there is no local
17 rule, there is other case law that says 30(b)(6)
18 is an appropriate mechanism to delve into the
19 factual basis for a response to a contention
20 interrogatory.

21 Now, did I pretty much sum that
22 up?

23 MR. TAYLOR: I wouldn't
24 characterize it as we are seeking their

1 contentions, I think the factual basis, and if I
2 may --

3 THE COURT: You're seeking the
4 facts.

5 MR. TAYLOR: And I can explain why
6 it's a little different than why here, we really
7 are seeking facts that they in response to our
8 contention interrogatories, they have stated
9 facts that they say support their contention
10 interrogatories. We have their contentions, but
11 they have stated facts in support of those, and
12 we want to explore those in very general terms.
13 We want to explore those fact and the most
14 efficient went way to do it is to sit down with
15 someone who is more knowledgeable with these, we
16 are not seeking -- we have their contentions, we
17 just want the facts that they've identified that
18 they're relying on that support their
19 contentions.

20 THE COURT: That's the interesting
21 question that you present. There is fact
22 discovery in an ANDA case; right? Why do you
23 keep like swooping back trying to get under the
24 contention umbrella? You have got their

1 contentions, and now you want to have discovery
2 on facts at issue in this case. Why isn't it
3 just a straight forward 30(b)(6) deposition?

4 MR. TAYLOR: Well it is. And
5 perhaps it was unfortunate that we said the
6 factual basis underlying your contentions, using
7 my words, but it's clear that we're looking for
8 factual discovery about certain topics. And
9 again, as I said, we have served them with
10 contentions, they have given us responses and in
11 those responses to support their contentions,
12 they have identified facts, and those are the
13 facts --

14 THE COURT: Give me an example --
15 are you satisfied taking it out from under the
16 contention umbrella, which incidentally I
17 actually found a Fifth Circuit case that says
18 you can take 30(b)(6) on beliefs and opinions of
19 the entity, which I don't want to mess this case
20 up with, but it interest me.

21 But let's assume that they are
22 correct that in this district absent some
23 factual circumstance, we prefer that contentions
24 be done by interrogatory, that's been

1 accomplished, now you have the responses and now
2 you're in fact discovery, are you comfortable
3 just saying we want fact discovery and this
4 30(b)(6) is one of the ones you're allotted in
5 the scheduling and move forward.

6 MR. TAYLOR: Yes, Your Honor, it's
7 the fact, again, we said underlying their
8 contentions, but it's the facts about those
9 topics is what we're looking for, the facts that
10 --

11 THE COURT: Give me an example of
12 the kind of question on the fact issue that
13 you're trying to describe to me would be --

14 MR. TAYLOR: For example, one of
15 our 30(b)(6) topics is the factual contentions
16 underlying your -- the factual basis underlying
17 your contention -- perhaps we should have used
18 some other phrase that the secondary
19 considerations of nonobviousness apply, or
20 support your theory that -- support the validity
21 of the patents, in response to that, they named
22 the usual secondary indicia, commercial success,
23 failures of others, long felt need and they also
24 stated there is a direct nexus between these

1 second indicia and our product, and the support
2 of each of these second indicia, for example,
3 failure of others, long felt need, they went
4 then on to if long felt need supports, and then
5 under that they made statements like others have
6 failed. We have no evidence that anybody else
7 has ever successfully produced a product like
8 that.

9 THE COURT: Why do you have expert
10 discovery on their expert as opposed to a
11 30(b)(6) representative deposition on facts
12 underlying a contention?

13 MR. TAYLOR: They have put in
14 play, they have -- Reliant has represented that
15 they are not aware of evidence, or that they
16 have evidence to support each of these or they
17 have a factual basis for supporting each of
18 these, we simply want to know what that is.

19 THE COURT: As long as you can get
20 it, but if you have to get it as part of the
21 underlying support for their expert's opinion,
22 why wouldn't that satisfy your need?

23 MR. TAYLOR: Well, at this point
24 Reliant itself has already formed these opinions

1 based on these facts, we want to know what these
2 facts are now so we can begin preparing our
3 defense rather than waiting while we're in fact
4 discovery we could find out, what evidence, what
5 investigation did you undergo to support these
6 statements you made, long felt need, they talk
7 about all these doctors have prescribed this as
8 their first choice.

9 THE COURT: Why don't you serve an
10 interrogatory?

11 MR. TAYLOR: This is where this
12 came from, we served an interrogatory.

13 THE COURT: No, for supplemental
14 response.

15 MR. TAYLOR: We have, and earlier
16 in this case we did. We had a dispute over
17 their initial response to our infringement
18 interrogatory, we got all the way to the point
19 of briefing it, the last week briefing was done
20 as we withdrew it on based on the representation
21 that they would supplement, and they did, but in
22 these cases they give very general statement of
23 fact that support. We can go back and say we
24 need more detail and they will come back and

1 give us more detail, we'll say that's not
2 enough, we'll end up back in motion practice.
3 Now that we have their factual contention, we
4 have documents they produced, if they produce a
5 knowledgeable witness we can sit down with the
6 witness and question the person, we know what
7 the issues are that we are going to ask about,
8 it's not overly burdensome for their witness to
9 answer those, it's a more efficient way of doing
10 it instead of going back and forth.

11 THE COURT: All right. Thank you.

12 MS. WILLGOOS: Your Honor, first
13 of all, we agreed with you that particularly
14 with respect to infringement and validity, our
15 factual bases and contentions are primarily
16 appropriate subject matter for the expert report
17 and not for a deposition.

18 In addition, we have provided them
19 with both interrogatory responses that they have
20 never asked us to supplement since we did that
21 until their opposition to this motion, they
22 never in the five months since we served them at
23 any time indicated that those were lacking in
24 any way.

1 In addition, we are providing them
2 with a 30(b)(6) witness regarding sales,
3 marketing, that's occurring next week. We have
4 already provided them with a 30(b)(6) witness
5 regarding Reliant's basis for bringing suit, and
6 have pursued investigation.

7 And so the discovery that they
8 claim that they need they already have or will
9 get in the next several weeks in the form of
10 interrogatories and appropriate deposition
11 topics that are limited specifically to facts
12 and not to Reliant's contentions and legal
13 conclusions.

14 THE COURT: All right. Thank you.
15 She says you're going to get everything you are
16 asking for, just not in I guess the form --

17 MR. TAYLOR: Well, I guess the
18 topic she identified, if I go to one, one of the
19 categories, 30(b)(6) which would be the
20 infringement was the main concern there again
21 was what did they know at the time, what
22 investigation did they do at the time they filed
23 their complaint. In fact, yes, we do have some
24 other 30(b)(6) categories that should cover that

1 for that one topic. Another topic, it's a
2 little bit different, we also have a 30(b)(6)
3 topic that concerns the factual basis for the
4 allegation that this is an exceptional case that
5 warrants attorneys' fees under Section 3 USC
6 285. The information they're seeking here is
7 very limited and there would be no burden on
8 Reliant to prepare a witness for this. Willful
9 infringement is the most common basis for
10 finding an exceptional case.

11 Here there is case law that filing
12 an ANDA cannot be the basis for willful
13 infringement. We simply want Reliant to tell us
14 what acts has Par committed, that you think Par
15 has committed that would raise the level of
16 willful infringement or what other conduct do
17 you think Par has engaged in that would justify
18 an exceptional case so that way we know what
19 we're defending because right now we have no
20 information.

21 Interestingly in our opposition
22 papers, we cited a case, Brocko from New Jersey.
23 In distinguishing that case in their reply brief
24 they actually confirm why this topic is

1 appropriate for 30(b)(6). There it was a false
2 advertisement case as Reliant characterized it,
3 a false advertising case. The plaintiff did not
4 identify the statements that were made by the
5 defendant that they thought resulted in false
6 advertisement, so a 30(b)(6) is appropriate to
7 tell them what statements did you make.

8 Here, all we're asking for is what
9 conduct, what do you think we did that would
10 rise to the level of an exceptional case. We
11 know what we're defending against. We don't
12 have anything yet. In this sort of limited
13 topic, 30(b)(6) is an appropriate efficient way
14 of doing it and their analysis of the case
15 supports that.

16 As far as I can give other
17 examples of the factual statements made in their
18 responses, so the factual -- again, and the
19 responses, the contention interrogatories that
20 are not the couple of topics that my colleague
21 identified which kind of went, for the most part
22 went towards our infringement 30(b)(6) topic,
23 but again, I have already talked about the
24 secondary consideration topic, they have

1 identified underlying facts and we want to know
2 what evidence, what do you have that supports,
3 for example that doctors are making this their
4 primary choice, that for example, and also for
5 long felt need -- I'm sorry, for failure of
6 others that no one else has been able to come up
7 with this product, so there is a failure of
8 others, other than saying that our ANDA shows
9 that that is true, because we -- they say we're
10 unable to come up with another formulation.

11 Another of our topics seeks the
12 factual basis for that belief that their
13 product, their commercial embodiment falls
14 within the '580 patent that's at issue here.

15 Again, this was stated, this
16 itself stated that the Ritheral product, our
17 commercial embodiment, falls within the patent,
18 we stated as a fact in support of their
19 secondary considerations interrogatory response.

20 They must have had a belief or
21 they had some basis for believing that their
22 product falls within the '580 patent, they have
23 data about the characteristics about its
24 performance that show that it falls within the

1 limitations of the patent. Certainly there must
2 be technical people at Reliant who can testify
3 about here is the evidence we have had about how
4 our drug performs, here is the evidence that we
5 have about its characteristics and describe and
6 explain to us what this document, what this
7 evidence, again, it's something they have
8 introduced in response to a contention
9 interrogatory as a fact.

10 And we need, although we can
11 certainly get an expert's opinion on why this
12 evidence is warranted, we should be able to
13 investigate what evidence do you have, what
14 other evidence might you have that can
15 contradict or support your belief that this drug
16 falls within the '580 patent. We believe in
17 these circumstances which we have already
18 submitted contention interrogatories and facts
19 have been identified, we now should be able to
20 explore the basis for the factual statements
21 that they make.

22 THE COURT: All right. Thank you.

23 Okay. With regard to the
24 plaintiff's motion, Reliant's position motion

1 for a protective order regarding Par's notice of
2 deposition to Reliant pursuant to Rule 30(b)(6)
3 which is Docket Item 172, I find that the
4 requested deposition is in this context of
5 inquiring about the contentions that Reliant
6 asserts in the litigation. I think that that's
7 clear both from the papers and from the
8 presentation here this morning.

9 30(b)(6) depositions I think can
10 be a mechanism to a party to ascertain the
11 contentions of the opponent because I think
12 30(b)(6) depositions can be used to probe for
13 beliefs and opinions held by a party or the
14 entity that is a party.

15 I think that Reliant has correctly
16 stated in its papers that in this district there
17 is a preference that contention discovery be
18 conducted by interrogatory even when factual
19 information is sought, and then that information
20 can be further probed in the course of the other
21 available mechanisms for discovery.

22 Having found that this is
23 contention discovery that's sought, even though
24 it's in a factual nature, I'm going to deny the

1 motion being persuaded that this -- our district
2 practice of deferring to interrogatories is
3 appropriate in the circumstances of this case.
4 So the motion will be granted for the protective
5 order on that notice of deposition.

6 I should also add that with the
7 circumstances of this case I think it's clear
8 that the information sought is available in
9 several other procedures available under the
10 discovery rules.

11 Okay. I think that closes your
12 two applications out.

13 MR. BLUMENFELD: It does, Your
14 Honor.

15 MR. TAYLOR: I'm not raising this
16 trying to argue it, but we have had a motion for
17 disqualification of former lawyers. I just want
18 to make sure it was on your Your Honor's radar
19 screen.

20 THE COURT: Absolutely. I'm sure
21 you have heard this before, I don't know if
22 everyone has heard it, I never lose a motion on
23 the screen. I know they're there, in fact I get
24 a weekly report from the chamber staff, and I

1 sometimes don't move to certain motions
2 because -- not because I don't know they're
3 there or because I don't have the energy to
4 attend to them, there is usually something else
5 behind my holding back.

6 And so I'm aware of the
7 disqualification motion, I know I heard it back
8 in November or something the first time or
9 whenever it was, but I'm holding it and you'll
10 probably hear from me in the future on that
11 motion.

12 You know, not to talk about that
13 motion, I was holding an opinion, and I wanted
14 to hold it longer, I'm just anxious to see the
15 Federal Circuit on this double patent in the
16 pharmaceutical cases. I just know something has
17 got to be coming out of there.

18 But sometimes it's hard to explain
19 that to the parties who are anxious to get a
20 decision. You think there is going to be an all
21 four corners dropping of a bomb, and if you -- I
22 had in the Lipitor case on written description,
23 and then I didn't hold it because everybody
24 wanted Lipitor out and sure enough they decided

1 it and then told me what I did wrong by
2 predicting what they might do, so sometimes
3 that's going on, too. But don't ever feel that
4 radar has broken, if you do, it's good to bring
5 it. I do appreciate that. You can be sure that
6 we have it on the scope, but I'm well aware of
7 the motion, I have it in mind, it keeps me up
8 some nights even if that makes you feel any
9 better.

10 MR. TAYLOR: In that same vein,
11 Your Honor, just a reminder that Barr also has a
12 motion that's been pending since January to
13 compel the discovery of foreign inventors who
14 are also trying to get through the procedure --

15 THE COURT: It's on the list as I
16 came to this. As a matter of fact, the group
17 before you had two motions to dismiss. I mean,
18 I know about them, too, but all in time.

19 MR. TAYLOR: Thank you, Your
20 Honor.

21 THE COURT: But you know, again,
22 don't ever be afraid to bring it to my
23 attention, that can also be helpful, too. I'm
24 never offended when someone says we want to

1 remind you this is pending.

2 Thank you.

3 (Court recessed at 11:50 a.m.)

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1 State of Delaware)
2 New Castle County)

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4 CERTIFICATE OF REPORTER

5 I, Dale C. Hawkins, Registered Merit
6 Reporter and Notary Public, do hereby certify that
7 the foregoing record is a true and accurate
8 transcript of my stenographic notes taken on March 7,
2008, in the above-captioned matter.

9 IN WITNESS WHEREOF, I have hereunto
10 set my hand and seal this 14th day of March, 2008 at
11 Wilmington.

12 _____
13 Dale C. Hawkins, RMR
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